No. 4535

16

United States Circuit Court of Appeals

For the Ninth Circuit.

RALPH FILCHER, ALBERT B. SCHMIDT and CHARLES F. JONES.

Appellants,

vs.

UNITED STATES OF AMERICA, and NORTHERN PACIFIC RAILWAY COMPANY, a corporation, FLORENCE MINING COMPANY, a corporation, and JOSEPH KUNTZ, JR.,

Appellees.

BRIEF ON BEHALF OF NORTHERN PACIFIC RAILWAY COMPANY, AND FLORENCE MINING COMPANY AND JOSEPH KUNTZ, JR.

Appellees.

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NAEGELE PRINTING CO., HELENA, MONT

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BRIEF AND ARGUMENT.

By the amended bill of complaint, cancellation of the patent was sought on the ground of fraud, and on the further ground that through mistake or inadvertance the land in controversy was classified as non-mineral. The complaints in intervention fur-

ther charge that the Land Department was without jurisdiction to issue the patent for the land in controversy for the reason that the notice of classification in describing the land as "Section 9," when the same had not been surveyed, was insufficient.

The intervenors had no right to intervene except upon the assumption that the notice was insufficient. If the notice was sufficient, they are foreclosed from asserting any claim to the land by failing to appear or make any protest against the classification of the land as non-mineral.

Section 5 of the Classification Act, (28 Stat. 683), requires that there shall be filed "in the office of the Register and Receiver of the land office of the land district in which the land examined and classified is situated, a full report, in duplicate, in such form as the Secretary of the Interior may prescribe, showing all lands examined by them during the preceding month, and specifying clearly, by legal subdivisions, where the land is surveyed, or otherwise by natural objects or permanent monuments to identify the same, the lands classified by them as mineral lands, and those classified as non-mineral". The section further provides that upon the receipt of the report the register of the land office shall cause to be published a "*notice of the classification of lands as shown by said report,* and any person, corporation, or company feeling aggrieved by such classification may, at any time within sixty days after the first publication of such notice, file with the Register and Receiver of the

land office a verified protest against the acceptance of said classification" etc.

Section 6 provides in part as follows:

> "That as to the lands against the classification whereof no protest shall have been filed as hereinbefore provided, the classification, when approved by the Secretary of the Interior, shall be considered final, *except in case of fraud,* and all plats and records of the local and general land office shall be made to conform to such classification. All lands so classified as above without protest, and the classification whereof is *disapproved* by the Secretary of the Interior, and all lands whereof the classification has been invalidated for fraud, shall be subject to hearing and determination *in such manner as the Secretary of the Interior may prescribe.*"

If the notice was sufficient, the classification and approval thereof by the Secretary have the effect of a judgment against the intervenors and they will not now be heard to question the character of the land.

Ross v. Stewart, 227 U. S. 530.

In the case just cited the law required commissioners to be appointed who had jurisdiction to decide contests resulting from conflicting applications to purchase lands in a townsite in the Cherokee Nation. The court in the opinion said:

> "In the petition the plaintiff now does what

he failed to do in the contest; that is, takes issue with the allegations of the complaint therein by denying that they were true; and he insists that in this way the petition shows that misrepresentation and fraud were practiced upon the administrative officers, whereby the patent was issued to the defendant when it should have been issued to him. The insistence cannot be sustained. The contest was not ex parte, as were the proceedings involved in United States v. Minor, 114 U. S. 233, 240-243, 29 L. ed. 110, 112-114, 5 Sup. Ct. Rep. 806; Sanford v. Sanford, 139 U. S. 642, 644, 650, 35 L. ed. 290, 291, 11 Sup. Ct. Rep. 666; and Svor v. Morris, 227 U. S. 524, ante, 623, 33 Sup. Ct. Rep. 385, but was an adversary proceeding to which the plaintiff was a party, of which he had due notice, and in which he had full opportunity to meet and controvert the very allegations he now says were untrue. The question whether they were true or otherwise is one the decision of which was committed by law to the administrative officers as a special tribunal, and they, as is conceded, decided that the allegations were true, their action being in the nature of a judicial determination. The applicable rule in such case is, that the misrepresentation and fraud which will entitle the unsuccessful claimant to relief against the decision and resulting patent must be such as have prevented him from fully presenting his side of the controversy, or the officers from fully considering it; and it is not enough that there may have been false allegations in the pleadings, or that some witness may have sworn falsely."

SUFFICIENCY OF NOTICE.

The first inquiry then should be as to the sufficiency of the notice.

E. C. Galbraith, a witness for the plaintiff, and a mineral examiner for the General Land Office, testified that a part of the township in which Section 9 is located was surveyed prior to the time Mr. Lindsay made his classification. He says that there was a survey of 40 rods in Section 8 where people had homesteads. (Record p. 123).

Robert A. Holly, a witness for plaintiff, and a mineral examiner from the General Land Office, testified that a part of the township was surveyed in 1870, the part consisting of the west tier of sections and a part of the second tier running north and south. He says:

> "A man could run a line over there and tie to this survey three quarters of a mile away and approximately locate Section 9." (Record, pp. 150, 151).

The township map introduced in evidence as an exhibit also shows the location of Section 9 with reference to the surveyed portion of the township at the time of the publication of the notice. The trial court in its opinion with reference to this matter said:

> "The description in report and published notice of the land as Section 9 sufficed to disclose its artificial boundaries and permanent monuments, being equivalent to describing it as 'a

> tract one mile square, the artificial boundaries of which are four square to the cardinal points of the compass, and the northwest corner of which is one mile east of the permanent monument at the corner common to the survey of Sections 5, 6, 7 and 8 of said township'." (Record p. 77). U. S. vs. Northern Pacific Ry. Co. 1 Fed. (2d) p. 53.

The notice in effect described the land as a tract one mile square, one mile east of the section line between surveyed Sections 7 and 8. The notice was clearly sufficient.

> West v. Edward Rutledge Lumber Co., 221 Fed. 830, decided by this court, Same case, 244 U. S. 90,
>
> Farrell v. Edward Rutledge Lumber Co., 258 Fed. 161, decided by this court, Same case, 255 U. S. 268;
>
> Hammer v. Garfield Mining & Milling Co., 130 U. S. 291.

In the last case cited, in an opinion by Mr. Justice Field, it was decided that a reference to a well known mining claim was a sufficient reference to a natural object or permanent monument to comply with Section 2324 of the Revised Statutes providing for the record of a mining claim.

If, however, the notice was insufficient, in order to entitle intervenors to any relief, it was necessary for them to establish a prior and superior right to the land. Unless they have a right to the land by virtue of their mineral locations, they are in no manner aggrieved by the decree against the plaintiff.

Fisher v. Rule, 248 U. S. 314.

CLASSIFICATION CORRECT.

If the court should decide that it will go into the merits of the classification, our contention is that the land in controversy was regarded as *iron* land. Lindsay so regarded it. He saw what he called an iron dike upon the land which he likened to the deposit which had been explored and abandoned, as he reported, and open to re-location (Tr. p. 112).

Much stress is laid by appellants upon the following statement in Lindsay's report, "There is an iron dike extending through a part of this section, which has been worked to a limited extent, on the adjoining section to the east". They claim that this statement shows that Lindsay thought the prospecting work he saw was on Section 10, and, therefore, that it was not carefully examined by him. This is dealing in *surmise and conjecture,* and wholly insufficient in a suit to cancel a patent. Lindsay's report shows that he did discover the iron dike and workings which are admittedly located on Section 9. His description of them as open cuts

and that ore had been shipped therefrom and used for fluxing, proves that the land, the iron dike and works he examined are the same as those here involved, and that he found the land to be non-mineral, except as to iron; and also found that the property had been abandoned for many years.

There is no question but what the land he actually examined and reported on is the land here involved.

There are no old workings, or cuts on Section 10 which Lindsay could have examined by mistake. Gailbraith, who examined the land in 1921 and 1922, testified, "There are just two or three little prospect holes on Section 10, *new ones.* * * * There is no other working to which he (Lindsay) could have referred, except that on the Never Pay. That is the one he meant." (Tr. p. 121).

Iron deposits are open to locations under the mining laws. But iron lands are not excepted from the Northern Pacific grant (13 Stat. 365). Those who had attempted to work this land regarded it as valuable only for iron, and shipped the ore as iron.

Arthur Loiselle, a witness for plaintiff, testified that he worked there, and that:

> "The nature of the ore was maganese, iron and jasper quartz. We shipped the maganese iron." (Tr. p. 136).

> "I located an adjoining claim with Mr. Moraw, * * * The second year Mr. Moraw wrote me asking me if I wanted to do the

> representing work on it, and I told him no, I would give him my interest. * * * * * When I say this land is mineral in character anybody can see that. I mean *iron is mineral*". (Tr. p. 138).

Henry Loiselle, a witness for plaintiff, testified that he worked there in 1904; that "the nature of the ore was iron and maganese. * * * I considered a cropping of iron as mineral" (Tr. p. 139).

John Reed, a witness for plaintiff, testified that he took an option on Filcher's claims, but gave it up (Tr. pp. 145 and 146).

Mrs. Brijkvok, former wife of Filcher, testified:

> "During the time Mr. Hewitt was there, they were shipping iron. * * * I never heard Mr. Jones say what kind of ore he claimed he had there. They were always referred to as iron mines". (Tr. p. 159).

The assays from the twenty cars of iron ore shipped by Raiff and Cook (Tr. p. 162) showed practically no value other than iron.

A. M. Cheney, who later turned over his claim to Jones, shipped ore to East Helena Smelter (Tr. p. 157). The smelter returns on such ore show "no returns on gold, silver, lead or copper. Payment was for iron only" (Tr. p. 168). Jones shipped two cars of twenty tons each in 1909 and after paying freight charges one car netted $8.90, and the other $18.00, or less than a dollar per ton (Tr. p. 130).

It is true that Jones (Tr. p. 131), Leyson (Tr. p. 141) and Gailbraith (Tr. p. 119), testified as to assays made from selected samples, most of which were taken after Raiff and Cook had discovered valuable mineral in the fall of 1921. Those assays showed small values in gold and silver.

In Judge Bourquin's opinion (Tr. p. 83) he discusses this evidence, and says:

> "At this trial many assays of new samples have been submitted by plaintiffs. They are about as those before, but many of them are not sufficiently proven as from ore bodies known before patent, or from ore bodies of probable extent. Some admittedly are from the enlarged open pit, and others are from workings rather indifferently identified as of date before the patent if not before the classification. The latter is the vital date. All subsequent work and discoveries are incompetent and immaterial, for the condition at classification cannot be proven by the most fallible of all criteria, subsequent events."

Even Hewitt, who found values in gold, said it was not valuable from a gold and silver standpoint and that he was shipping iron ore for flux and he abandoned the property (Tr. p. 135). Professor MacDonald regarded it as iron. He testified:

> "I have been on the land a number of times since the Florence Mining Company discovered ore there in 1920. Have examined practically all of those cuts. A great many of the cuts are

> merely in loose wash, and don't penetrate the wash. Others are in the sandstone, while others in that section are in andesite. Most of the cuts in the vicinity of the workings show iron or iron stain, but I could not—I had no idea that there was any other mineral in connection with it other than maganese, and *maganese is treated* in this lease the same *as iron,* as far as the smelter is concerned." (Tr. p. 168) (Italics ours.)

Messrs. Cook and Raiff regarded it as iron ore only. Mr. Raiff leased the property after patent for iron ore to be used as a flux, as it had been used by Hewitt, and shipped twenty-two cars *without profit* (Tr. pp. 161 to 165), before valuable minerals were discovered.

In Hales v. Central Pacific Ry. Co., 46 L. D. 476, decided November 14, 1918, the Secretary of the Interior held that under the excepting clause in the grant to the Central Pacific Railway Company the term *iron land* will be construed in its ordinary meaning; that is, land not only valuable for iron, but as between iron and other mineral content, chiefly valuable for iron.

In Holter v. N. P. R. R. Co., 30 L. D. 442, Secretary Hitchcock, in an opinion prepared by Assistant Attorney General Van Devanter, now Mr. Justice Van Devanter, held, in a protest against a non-mineral classification:

> "Taking into consideration all the evidence, and especially that as to the mineral discovered

> or developed on or adjacent to the land, the geological formation of the neighborhood, and the reasonable probabilities of this land containing mineral deposits because of its said formation, location or character, and giving to the mining location thereon their due weight as prima facie evidence that the forty acre tracts upon which they are situate are mineral in character, it nevertheless appears that the land does not contain mineral in sufficient quantity or of such value as to justify giving it a mineral classification."

In Colorado Coal & I. Co. v. U. S., 123 U. S. 307, 31 L. Ed. 182, the court quoted the following with approval:

> "In this class of cases, the respect due to a patent, the presumption that all the preceding steps required by the law has been observed before its issue, the immense importance and necessity of the stability of titles dependent upon these official instruments demand that the effort to set them aside, to annul them, or to correct mistakes in them should only be successful when the allegations on which this is attempted are clearly stated and fully sustained by proof. It is not to be admitted that the titles by which so much property in this country and so many rights are held, purporting to emanate from the authorative action of the officers of the Government, and, as in this case, under the seal and signature of the President of the United States himself, shall be dependent upon the hazard of successful resistance to the whims and caprices

> of every person who choose to attack them in a court of justice; but it should be well understood that only that class of evidence which commands respect, and that amount of it which produces conviction, shall make such an attempt successful."

In U. S. v. Central Pac. R. Co., 93 Fed. (9th Cir.) 871, the syllabus states the conclusion of the court as follows:

> "In a suit by the United States for the cancellation of a patent to land issued under a railroad grant, on the ground that the land was mineral, the burden rests on the complainant to overcome the presumption in favor of the patent by satisfactory evidence, not only that the land was known mineral land at the time the patent was issued, but that it is chiefly valuable for mineral purposes. Evidence that gold placer mining had formerly been carried on in a stream on the tract, but that it had been abandoned as worked out prior to the date of the patent, and that neither at that time nor since had there been any mines on the land producing mineral and capable of being worked at a profit, is insufficient, as is also evidence of the mineral character of adjoining land."

The intervenors and those who preceded them did nothing to develop the property, although, for some twenty-five years the opportunity was open to them, without interference. Their so-called representation work is trivial compared to the actual development work of Raiff and the Florence Mining Company.

Jones paid nothing for his claims. Cheney gave them to him (Tr. p. 157). Jones testified there was a shaft fifty-four feet deep on the claim when he got it in 1904 and that he sunk a ten foot hole (Tr. pp. 129 and 130). Galbraith, a mineral examiner, examined their claims in 1921 and 1922 (Tr. p. 117) and took samples.

> "These samples were all taken from *old openings,* practically all of them within *six feet* of the surface." (Tr. pp. 120 and 121).

Filcher did nothing to develop his claim. He merely cleaned out some of the debris in the Old Glory hole (Tr. pp. 128 and 176). His former wife swears that he did no work on the claim in 1914 or 1915 (Tr. p. 158). Raiff testified:

> "I had the glory-hole cleared out. It had apparently been caving off with the years until it was just full of rock. I don't think there were any timbers in there. It took four months to haul it out." (Tr. p. 161).

Cook testified:

> "When we started there were no indications of any new work". (Tr. p. 164).

MacDonald testified that when he examined the land in 1920 there was a "general air of abandonment at that time" (Tr. p. 169).

Lindsay who examined the land in July, 1913 in his report (Tr. p. 112) says: "The property has

been abandoned for many years, and is now open for re-location."

There was no remonstrance by Jones or Filcher against the approved classification of January 11, 1915, the patent of June 16, 1916, or the work done by Mr. Raiff and the Florence Mining Company, from February, 1920, until 1922, and after they had discovered and developed a mine upon property which had been practically, if not entirely, abandoned (Tr. p. 162).

In U. S. v. Marshall Silver Mining Co., 129 U. S. 579, 32 L. Ed. 734, the court said:

> "The dignity and character of a patent from the United States is such that the holder of it cannot be called upon to prove that everything has been done that is usual in the proceedings had in the Land Department before its issue, nor can he be called upon to explain every irregularity or even impropriety in the process by which the patent is procured. Especially is it true that where the United States has not received any damage or injury, and can obtain no advantage from the suit instituted by it, the *conduct of the parties themselves, for whose benefit such action may be brought, must itself be so free from fault or neglect as to authorize them to come, with clean hands, to ask the use of the name of the Government* to redress any wrong which may have been done to them.
>
> One matter which has been much discussed before us is, whether the Colorado Central Con-

> solidated Mining Company, one of the defendants in this suit, and the present owner of such title as passed to the Marshall Silver Mining Company by the patent sought to be vacated, is an innocent purchaser of the property in ignorance of any of the matters set up by the complainants. While it is not necessary to pass upon this subject in the view we have taken of the case, it is not improper to say that, as presented to us, the claim of that company to be an innocent purchaser presents a very formidable objection to the granting of the relief asked for in a court of equity." (Italics ours).

Mr. Raiff took his ten year lease of the premises for its assumed value for fluxing iron ore (Exhibit No. 28 Tr. p. 154 and Tr. p. 161). His testimony is not denied. Professor MacDonald, acting for the Railway Company, thought the property had no other value. He has satisfactorily explained his reason for recommending to the Land Commissioner of the Company that the lease provide for the payment for gold and silver. He testified:

> "I told the Land Commissioner that while to the best of my knowledge there was no other mineral in there, but suggested the possibility of striking other minerals, and the company should be protected in that way." (Tr. p. 168).

The plaintiff does not bring home to the Railway Company or its lessees any knowledge of a mineral value of this land other than for iron, prior to its non-mineral classification by the Government, or

before patent, or before the lease to Mr. Raiff nor until the discovery by Mr. Cook, while trying to ship iron ore under the Raiff lease. Of course, discovery after patent is not material.

Burke v. So. Pac. Ry. Co., 234 U. S. 669.

Furthermore, the evidence raises a reasonable doubt as to whether the intervenors had any rights or equities in said land at the time patent was issued. There is sufficient evidence of abandonment of all those claims prior to issuance of patent to sustain a finding to that effect. If they were abandoned, then the intervenors have no standing in court. The same high degree of proof required on behalf of plaintiff to set aside a patent on other grounds, is necessary to establish a prior right or equity in the land by one seeking to cancel a patent on that ground.

32 Cyc 1064 says:

> "The claimant must establish his rights and the invalidity of the patent by clear and convincing evidence, and if his evidence fails to establish a superior equity the legal title evidenced by the patent must prevail. In order to authorize a decree in favor of an equitable claimant by a senior entry against a junior entry and patent, all the evidence must be produced which would be required in the general land office for the issue of a patent."

Such testimony to overcome the presumption of title from patent "must be clear, unequivocal and

convincing, and not upon a bare preponderence of evidence which leaves the issue in doubt".

32 Cyc 1056.

U. S. v. Maxwell Land Grant Co., 121 U. S. 325, 30 L. Ed. 949.

Applying this rule to the evidence in the case, Judge Bourquin in his opinion said:

> "Referring to the rule of proof necessary to cancel a patent as aforesaid, it is not satisfied by the evidence in this record, considered in the light of the *indefinable impressions of the trial.*" (Tr. p. 83).

The decision of the trial judge who had the benefit of observing the witnesses and a better opportunity of weighing their testimony on disputed points, should be sustained on appeal, if the court deems it necessary to consider the questions of fact relating to the character, classification and prior occupancy of this land.

INTERVENOR'S EQUITIES.

The intervenors do not present a case which appeals to a court of equity. Their loss, if any, is not comparable to the loss Mr. Raiff and the Florence Mining Company would sustain if the decision were adverse to them, for their status is like that of a *bona fide* purchaser for value of a legal title without notice, whose expenditure of time, labor, and money upon the property has given it a value.

U. S. vs. Routt County Coal Co., 248 Fed. (8th Cir.) 485.

As to the character and degree of proof necessary in equity cases to invalidate titles held by purchasers in good faith for value, and without notice, under patents issued by the United States, See:

Colorado Coal & I. Co. v. U. S., 123 U. S. 307, 31 L. Ed. 182.

By their assignments of error and brief, the intervenors and appellants have treated the case the same as though the United States had joined in the appeal.

Under Equity Rule 37, the intervenors' rights are "in subordination to, and in recognition of, the propriety of the main proceeding," and if they have any right of appeal at all from the final decree against the government in the main proceeding, it is only on the theory that the notice of classification was insufficient to confer jurisdiction on the Land Department.

While we deny the right of the intervenors to complain of the decree, except on said question of jurisdiction, we will proceed to discuss the case the same as though the plaintiff had appealed.

ALLEGED FRAUD NOT PROVEN.

The United States sought to set aside a patent to a parcel of land, in place limits, of the Northern Pacific Railroad grant classified and approved by the Secretary of the Interior on January 11, 1915, pursuant to the Act of Congress of February 26, 1895, as non-mineral land, on the ground of *fraud* in its procurement. The alleged fraud consists in the filing of an affidavit by the company's selecting agent that these lands along with many other sections of land, "are vacant, unappropriated, and are not interdicted mineral nor reserved lands" and the patent issued in reliance on that affidavit. It is not claimed that said agent had any actual knowledge concerning the land, but that he is charged with notice of what he might have learned had he examined the land, that the land was in fact mineral in character. The inquiry of the court was, by this pleading, and by Section 6 of the Act of February 26, 1895 (28 Stat. 683), limited to the question of whether this affidavit constituted fraud.

U. S. v. Valley Land & Inv. Co., 258 Fed. (8th Cir.) 93;

U. S. v. Safe Inv. Gold Mining Co., 258 Fed. (8th Cir.) 872.

All evidence relating to the *facts* regarding the classification of this land by the agent of the government, and *mistakes*, if any, therein, was admitted *over the objection of defendants* (Tr. p. 107).

It is profitable to inquire into the origin and purpose of the affidavit, whether it was false or whether it was relied on as a showing concerning the character of the lands, for there is no other charge of fraud.

The form of affidavit was prescribed by the circular of the Commissioner of the General Land Office of November 7, 1879 (Exhibit 33 Tr. p. 171), and was in use as early as 1875. Doubtless all patents issued under all the railroad grants since 1875 rest upon a listing so verified. It was not a special showing made for this case; but an ordinary routine formal verification of an application for a patent to land granted by Congress. It misled no one, and no one acted in reliance on it as evidence of non-mineral character of land.

It is not true that this affidavit is required under the statutes, nor is it the affidavit referred to in So. Pac. Co. v. U. S. 249 Fed. (9th Cir.) 785-6 as required by existing regulations as to mineral or agricultural character. The affidavit as to character required by such regulations must be made after examination of the land and is the affidavit required by the regulations in 19 L. D. p. 21 as stated by the court in that case.

Secretary Noble appraised the affidavit in question in this case in the case of California & Oregon R. R. Co., 16 L. D. 262, when, on March 3, 1893, he returned two railroad lists of land without approval, for the reason that "The only showing offered by the company was the affidavit of the

selecting agent 'that the lands are vacant, unappropriated, and not interdicted mineral nor reserved lands' etc. * * * *. This affidavit is of little or no effect as tending to show the character of the lands selected, and might be made by any one."

True, the Northern Pacific Railway Company was required to make a showing as to the non-mineral character of lands listed or selected *prior* to February 15, 1900, and that requirement still obtains as to the Northern Pacific and all other land grant railroads, *except as to land classified under the Act of February* 26, 1895, and the showing must be by affidavit made after examination of the land.

The reason for requiring no showing of mineral or non-mineral character of land within classification districts of the Northern Pacific grant defined by the Act of February 26, 1895, is not the reason assumed by counsel, namely, to avoid an unnecessary second publication of notice; but to avoid the far more useless formality of requiring an affidavit as to a fact established by the judgment of a court of last resort. Secretary Hitchcock makes this plain in his instructions in 29 L. D. 503 (Ex. 34, Tr. p. 174). The question was presented to the Secretary in connection with the requirements of the circular of July 9, 1894 (19 L. D. 21), but his instructions are general and his reason adequate. The Secretary says:

> "As the classification provided for in the Act of February 26, 1895, is, upon its approval by

> the Secretary of the Interior, made final, except in case of fraud, so far as regards the adjustment of the grant to the Northern Pacific Railroad Company, you will not require *any* (Italict ours) showing bearing upon the character of any lands within the limits of its grant which have been classified under the act referred to".

No conceivable reason exists for requiring any showing to fortify the Secretary's conclusive finding that the land in controversy was non-mineral. No attempted showing would be re-received which did not accord with his previous finding; and certainly he was not deceived or mislead by an affidavit in strict accord with that finding? If an affidavit, not required by any statute or regulation, cannot be made the basis for a charge of perjury, it cannot be made the basis of a charge of fraud.

> Williamson v. U. S., 207 U. S. 425, 52 L. Ed. 278.

It is conceded that a patent for land may be avoided where its issuance is induced by a fraudulent affidavit by the applicant as to a material fact required to be established; but here the fact was established by the Secretary himself before the affidavit was made. The Secretary's finding was the foundation of the affidavit, not the affidavit the foundation of the finding. The affidavit was made in good faith, in reliance on the Secretary's final judgment and was true. The land was not

occupied, was vacant and not reserved or appropriated on the land office records; their records disclosed that it had been classified and *finally approved* as *non-mineral* land, and as *none* but *mineral* land can be appropriated under the *mining laws,* it necessarily follows that there was no basis for assuming or believing this land was appropriated at the time this affidavit was filed and patent issued.

In the case of Lee v. Johnson, 116 U. S. 48, the court said:

> "It is not enough, however, that fraud and imposition have been practiced upon the department, or that false testimony or fraudulent documents have been presented; it must appear that they have affected its determination, which, otherwise, would have been in favor of the plaintiff."

Also, Christir vs. G. N. Ry. Co. 284 Fed. (9th Cir.) 702.

ATTACK ON CLASSIFICATION

While the complaint, nominally, seeks to avoid a patent to land on the ground of fraud in its procurement, the real relief desired is to have the *court set aside the classification of the lands made by the Secretary of the Interior and make a new one.*

The patent did not transfer title to this land. The land is within place or primary limits, and title

passed on definite location of the Northern Pacific railroad in the early eighties. The patent is but the evidence of a title that had already passed. (Barden case, 154 U. S. 288). It remained for the Secretary of the Interior, in his own time and in his own way, to decide whether title had passed, that is, whether the land was mineral or otherwise excepted from the grant, and his finding is conclusive as to the facts, and persuasive as to the law.

Burke v. So. Pac., 234 U. S. 669, 58 L. Ed. 1527.

The Secretary's decision on that question is conclusive on the court, subject to be set aside on the ground of fraud and other well recognized grounds for relief in equity, *except* in the districts established by the Act of February 26, 1895, where his decision is final, except for *fraud alone*. Section 6 of this Act provides:

> "That as to the lands against the classification whereof no protest shall have been filed as hereinafter provided, the classification, when approved by the Secretary of the Interior, shall be considered final, *except in case of fraud,* and all plats and records of the local and general land offices shall be made to conform to such classification."

By a long line of devisions it is settled that the Land Department of the United States is a special tribunal established to supervise proceedings for the acquisition of title to portions of the public domain and that its decisions are final as to facts.

In the Barden case, 154 U. S. 326 to 329, the court cites some of those decisions, and on page 328 citing and quoting from the opinion in Heath v. Wallace, 138 U. S. 573, 585, the court said:

> "The question whether or not lands returned as 'subject to periodical overflow' are 'swamp and overflowed lands' is a question of fact properly determinable by the Land Department. It is settled by an unbroken line of decisions of this court in land jurisprudence that the decisions of that department upon matters of fact within its jurisdiction are, in the absence of fraud or imposition, conclusive and binding on the courts of the country."

This rule has been followed repeatedly in cases where the United States was plaintiff. We will cite but one very recent case (United States v. Atkins, 260 U. S. 220), where the United States attacked its patent and the court held that the act of the Commission to the five civilized Tribes in enrolling a name as that of a Creek Indian alive on April, 1899, amounted, when duly approved by the Secretary of the Interior, to a judgment in an adversary proceeding, establishing the existence of the individual and his right to membership, and is not subject to be attacked by the United States in a suit against those who claim his land allotment, in which the Government alleges that the person enrolled never existed and that the enrollment was procured by fraud on the Commission and resulted from gross mistake of law and fact. The Court

cited U. S. v. Wildcat, 244 U. S. p. 111, a similar case.

The power of the Secretary of the Interior finally to determine the character of the public land attempted to be appropriated, is unlimited except as it is restricted by Congress, and in this case by the Act of February 26, 1895, within certain districts in Montana and Idaho.

In the Barden case, supra, on page 330, the court said:

> "It is true that the patent has been issued in many instances without the investigation and consideration which the public interest requires; but if that has been done without fraud, though unadvisedly by officers of the Government charged with the duty of supervising and attending to the issue of such patents, the consequence must be borne by the Government until by further legislation a stricter regard to their duties in that respect can be enforced upon them."

And again on page 331:

> "But a patent issued in proper form, upon a judgment rendered after a due examination of the subject by officers of the Land Department, charged with its preparation and issue, that the lands were non-mineral, would, unless set aside and annulled by direct proceedings, estop the Government from contending to the contrary, and as we have already said in the absence of fraud in the officers of the department, would

be conclusive in subsequent proceedings respecting the title."

The Act of February 26, 1895, 28 Stat. 683, was the response of Congress to the suggestion of the Court in the Barden case of the further legislation in regard to the classification of lands. The Act was passed to assist the Secretary in the performance of his duty to determine mineral or non-mineral character of land in the supposed mineral districts of Montana and Idaho within the Northern Pacific grant. It provided for a classification by mineral land commissioners but their classification amounted to nothing until it was approved by the Secretary.

The mineral land commissioners were required to make their classification of unsurveyed land by reference to natural objects or permanent monuments but this expression of the will of Congress did not apply to the Secretary of the Interior.

The classification submitted by Watson Boyle amounts to a nullity because it was not approved by the Secretary. His jurisdiction over the land continued.

Love v. Flahive, 205 U. S. 199, 51 L. Ed. 768.

It is immaterial at what point of time the Secretary disapproved that classification. In his letter to the Commissioner of November 21, 1911 (Tr. p. 108), he stated:

> "I do not deem it advisable or proper to approve the lists submitted by you or other unapproved classifications described in your communication of July 26, 1911, without further information as to their character".

The Secretary's reason is stated to be that complaints had reached his department regarding the method of classification and the correctness of the classification as made.

Long prior to the approval of the Secretary of January 11, 1915, the Commissioner of the General Land Office had caused notice of the new classification to be published in newspapers as required by the Act of February 26, 1895 (Tr. p. 43 and Exhibit No. 3 Tr. p. 110), and in his letter to the local land officers enclosing copies of the notices for publication, they are advised that the original classification of these lands had been changed and reclassification is accordingly required.

Surely the adoption of a new classification to the extent of publishing notice of it pursuant to the Act of 1895 amounted to a disapproval of an earlier classification, and the whole proceeding of the Secretary in the matter of re-examination and reclassification of the lands was in effect a disapproval of the earlier classification which he had refused to approve. It certainly was not necessary for him to have used the word "disapproved", in order to make effective that portion of the act which permits him to hear and determine in such manner as the Secretary may prescribe. The act

gave no effect whatever to a classification until the Secretary's approval of it, and his withholding of his approval, especially followed up as it was by the approval of another classification, amounted to a disapproval of the first one.

The Secretary's approval of January 11, 1915, is attached to the Commissioner's communication of January 9, 1915 (Tr. p. 170), which certifies;

> "that all the requirements of the circular of April 13, 1895 (20 L. D. 350), in the classification of the above-described tracts have been complied with; that the lands have been re-examined in the field by a special agent of this office and reported by him as above classified; that all protests have been finally dismissed and the records of this office do not show any mineral conflict with the tracts classified as non-mineral."

That certificate amounts to a finding of fact which is not open to re-examination and if it is assumed that a formal disapproval of an earlier classification was essential to a compliance with all the requirements of the circular of April 13, 1895, the certificate must be taken as conclusive that there was such a disapproval. Certainly the Secretary assumed that he had disapproved the earlier classification even if the only disapproval consisted in the act of approving the later classification. There is no legal requirement that the Secretary shall conduct a formal hearing or examination in order to validate the approval. His

power to approve is unlimited; the manner in which he shall reach the conclusion to approval is not prescribed by Congress and it would be futile to require him to ignore evidence already in his office which he regarded as sufficient and gather new evidence of a fact about which he was satisfied from the records of his own office.

The Court will not speculate as to what might have been the result if a different state of facts had been before the Secretary or whether the Geological Survey would have classified this land as mineral if the matter had been referred to them or whether the Secretary made a mistake in arriving at his conclusion from the facts before him. The decision was for the Secretary and not for the Court.

As said in Lee v. Johnson, 116 U. S. 48, the Court does not interfere with the title of a patentee when the alleged mistake relates to a matter of fact concerning which these officers may draw a wrong conclusion from the testimony. A judicial inquiry as to the correctness of such conclusions would encroach upon a jurisdiction which Congress has developed exclusively upon the Department. It is only when fraud and imposition have prevented the unsuccessful party in a contest from fairly presenting his case or the officers from fully considering it that a court will look into the evidence.

The approved classification of January 11, 1915, was not made pursuant to the Act of June 25, 1910, and consequently it was unnecessary for the Secre-

tary or the Commissioner to refer the matter to the Geological Survey pursuant to the circular of July 26, 1910, even though Counsel regards that procedure to have been more desirable than the examination of the land by an agent of the Land Department. There was no *law* requiring the examination to be made by the Geological Survey, and the Secretary and Commissioner had authority to disregard or modify their circular of July 26, 1910, and to have the land examined in any manner they saw fit and they did so through the machinery of their own office pursuant to provisions of Section 6 of Act of February 26, 1895. This section provides:

> "All lands so classified as above without protest, and the classification whereof is *disapproved* by the Secretary of the Interior, and all lands whereof the classification has been invalidated for fraud, shall be subject to hearing and determination *in such manner as the Secretary of the Interior may prescribe.*"

The classification was not made by Lindsay but by the Secretary. The approved classification (Tr. pp. 170 and 171) shows upon its face that it was made pursuant to the Act of February 26, 1895, (28 Stat. 683), and not under the Act of June 25, 1910 (36 Stat. 739).

The Act of June 25, 1910, merely continued in

force the Act of February 26, 1895, and, so far as applicable here, reads as follows:

> "That the following sums be, and the same are hereby, appropriated, for the objects hereinafter expressed, for the fiscal year ending June thirtieth, nineteen hundred and eleven, namely:
>
> * * * * not exceeding thirty thousand dollars to enable the Commissioner of the General Land Office to complete the examination and classification of lands within the limits of the Northern Pacific grant under the Act of July second, eighteen hundred and sixty-four, as provided in the Act of February twenty-sixth, eighteen hundred and ninety-five such examination and classification when *approved by the Secretary* of the Interior to have the *same force and effect as a classification by the mineral land commissioners* provided for in said Act of February twenty-sixth, eighteen hundred and ninety-five." (Italics ours.)

While the Commissioner's Circular of July 26, 1910, set out in full in 39 L. D., pages 113 to 124, called upon the Geological Survey for assistance in making such examination, that did not prevent the commissioner from having the examination made in some other manner.

In conclusion, we cite the able and thorough opinion of the trial judge, (U. S. vs. Northern Pacific Railway Company, et al, 1 Fed. (2d) 53), who had the benefit of the "indefinable impressions

of the trial'' and submit the decree should be affirmed.

Respectfully submitted,

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